No. 14,703

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA for the Benefit and on Behalf of Harry Sherman, Chas. Robinson, Ronald D. Wright, Stuart Scofield, Lee Lalor, William Ames, Ernest Clements, Carl Lawrence, Gordon Pollock and Harold Sjoberg, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,

Appellants,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing Business as Carter Construction Company, CARTER CONSTRUCTION COMPANY and HARTFORD ACCIDENT AND INDEMNITY CO.,

Appellees.

BRIEF FOR APPELLANTS.

CHARLES P. SCULLY,
995 Market Street, San Francisco 3, California,
GARDINER JOHNSON,
THOMAS E. STANTON, JR.,
111 Sutter Street, San Francisco 4, California.
Attorneys for Appellants.

JOHNSON & STANTON,
111 Sutter Street, San Francisco 4, California,
Of Counsel.

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BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This is an appeal from a summary judgment granted to the appellee Hartford Accident and Indemnity Company in a suit brought by the appellants under the Miller Act (U.S.C. 40: 270a) to recover health and welfare contributions from Carter Construction Company and the surety on its bond.

Appellants constitute the Board of Trustees of the Laborers Health and Welfare Trust Fund for

Northern California (hereinafter referred to as the "Fund") which was established by collective bargaining for the benefit of laborers employed on construction projects in the 46 Northern counties of California.

The collective bargaining agreements which provided for the establishment of the Fund were negotiated by two Chapters of The Associated General Contractors of America, Inc., on behalf of the contractor employers, and the Northern California District Council of Hod Carriers, Building and Construction Laborers of the International Hod Carriers, Building and Common Laborers' Union of America, on behalf of the employees (Admissions, Exh. C, Tr. 21). The agreements were so-called "Master Labor Agreements" which provided the wage rates and many other terms and conditions governing the employment of construction laborers in the Northern California area. On the subject of health and welfare, the agreements provided that commencing on February 1, 1953, each individual employer covered by the agreements would contribute the sum of seven and one-half cents per hour for each hour worked by employees under the agreements to the Fund (Amended Complaint, par. X, Tr. 7-8).

The Fund itself was established by a Master Trust Agreement dated March 4, 1953, which was negotiated pursuant to the Master Labor Agreements by the parties to those agreements (Admissions, Exh. C, Tr. 21). The Trust Agreement provides that the Board of Trustees of the Fund shall have the power to de-

mand and enforce the prompt payment of the contributions agreed to be paid to the Fund (Art. IV, Sec. 3). It likewise provides that the Board shall promptly use the monies available in the Fund to provide the benefits specified in the Health and Welfare Plan (Art. IV, Sec. 4). Pursuant to this directive, the Board has procured insurance policies which have provided substantial benefits for construction laborers and their families, in the form of life insurance, accidental death and dismemberment benefits, hospital expense benefits, surgical expense benefits, X-Ray and laboratory expense benefits, and supplemental accident expense benefits.

The Trust Agreement provides that no employee or other beneficiary shall have any right or claim to benefits under the Health and Welfare Plan except as provided in the insurance policies procured by the Board of Trustees (Art. VIII, Sec. 2). The agreement also provides that contributions to the Fund shall not "constitute or be deemed to be wages due to the employees *with respect to whose work such payments are made*"* and that no employee shall be entitled to receive any part of the contributions made to the Fund in lieu of the benefits provided by the Health and Welfare Plan (Art. II, Sec. 3). In the actual operation of the Health and Welfare Plan, an employee is required to work at least 400 hours in a designated six-month period for one or more contributing employers in order to acquire eligibility

*Emphasis is added throughout this brief unless otherwise noted.

for insurance coverage under the Plan for the succeeding six-month period. Thus, each hour of work under one of the Master Labor Agreements requires the individual employer to pay seven and one-half cents into the Fund, which results in a credit for the employee toward eligibility to receive the substantial benefits provided by the Fund for him and his dependents.

The defendant Carter Construction Company was represented in collective bargaining by the Associated Home Builders of Sacramento, which was one of the contractor associations signatory to the Master Labor Agreements and to the Master Trust Agreement (Admissions, Exh. C, p. 21, Tr. 21). The Company employed construction laborers on two construction projects for the United States Government, and thereafter defaulted in contributions due to the Fund for the months of February, March and April, 1953. Under the terms of the Master Trust Agreement, this default subjected the Company to an additional liability to the Fund for liquidated damages in the amount of $20 for each monthly delinquency and for reasonable attorneys' fees, court costs and other reasonable expenses incurred by the Board of Trustees in connection with the collection of the delinquent payments (Admissions, Exh. C, Art. II, Sec. 8, and Art. IV, Sec. 3, Tr. 21).

As required by the Miller Act (U.S.C. 40: 270a), the Carter Construction Company provided a payment bond with respect to each of the Government projects. The present action is brought by the appellants

against the Carter Construction Company and against appellee Hartford Accident and Indemnity Co., the surety on its bond, to recover the delinquent health and welfare contributions, liquidated damages and attorneys' fees.

THE STATUTE AND BOND INVOLVED.

Section 270a of Title 40 of the United States Code, commonly known as the Miller Act, requires that before any contract exceeding $2,000 for the construction of a public work of the United States is awarded to any person, such person must furnish to the United States a payment bond ". . . for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person." Section 270b of Title 40 of the United States Code provides that every person who has furnished labor or material in the prosecution of the work provided for in such contract ". . . and who has not been paid *in full* therefor" shall have the right to sue on such payment bond for the amount unpaid at the time of the institution of such suit for the sum or sums due him.

The payment bond provided by appellees pursuant to the Act in connection with each project (Admissions, Exh. B, Tr. 19), stipulates that:

> "Now, Therefore, if the principal shall promptly make payments to all persons supplying labor and material in the prosecution of the work provided for in said contract, . . . then this

obligation to be void; otherwise to remain in full force and virtue."

SUMMARY OF ARGUMENT.

The provisions of the Miller Act are to be liberally construed to effectuate the purposes of the Act, namely, (1) to protect laborers and materialmen who furnish services and supplies in the prosecution of Government projects, and (2) to protect the Government from loss as the result of delays caused by steps which laborers and suppliers might reasonably be expected to take to protect themselves in the absence of the security provided by a payment bond.

The claims in litigation come within both the intent and the letter of the Act.

Appellee surety conceded before the District Court that health and welfare contributions constitute a part of the compensation agreed to be paid by the contractor for the services of the laborers on the construction projects, although it denied that the contributions could be called a part of the "wages" of the men. The obligation of the bond is to pay the laborers "in full" for their services, and not merely their hourly wages. The obligation, fairly construed, includes every form of compensation agreed to be paid for services, and specifically it includes health and welfare contributions. The appellants are suing to enforce this obligation in the right of the laborers and for their benefit.

The claims should also be held covered by the bond in order to achieve the second main objective of the Miller Act, namely, to protect the Government against delays. The obligation to make health and welfare contributions is a part of the Master Labor Agreements under which all major construction projects in the Northern California area are manned. If an individual contractor defaults in his contributions he breaches the applicable Labor Agreement, and subjects himself to the probability of strike action by the Union. The use of this enforcement device by the Union could seriously disrupt and delay projects being performed by the contractor, including Government projects.

The obligation to pay liquidated damages and attorneys' fees in the event of a default is a part of the total obligation assumed by the contractor in consideration for the services supplied to him, and consequently this obligation is likewise covered by the payment bonds.

ARGUMENT.

A. THE HEALTH AND WELFARE CONTRIBUTIONS ARE A PART OF THE COMPENSATION AGREED TO BE PAID FOR LABOR SUPPLIED IN THE PROSECUTION OF THE GOVERNMENT PROJECTS AND THEY ARE THEREFORE WITHIN THE OBLIGATION OF THE PAYMENT BONDS.

There can be no serious dispute as to the fact that the health and welfare contributions required of the defendant contractor are a part of the compensation

which the contractor agreed to pay for the labor of the men who worked on its projects.

It was the general recognition of this fact which led Congress to enact Section 302 of the Labor Management Relations Act of 1947 (U.S.C. 29: 186), which imposed strict limitations and regulations upon the administration of health and welfare funds for the protection of the individual laborer. The Fund was established in compliance with the requirements of this Act.

The Congressional policy which led to enactment of Section 302 was stated in Senate Report 105, 80th Cong., p. 52 (reported at CCH Labor Law Service, par. 4830.25) as follows:

> "An amendment reinserting in the bill a provision regarding so-called welfare funds similar to the section in the Case bill approved by the Senate at the last session [is proposed]. It does not prohibit welfare funds but merely requires that, if agreed upon, such funds be jointly administered—**be, in fact, trust funds for the employees, with definite benefits specified, to which employees are clearly entitled, and to obtain which they have a clear legal remedy.** The amendment proceeds on the theory that union leaders should not be permitted, without reference to the employees, to divert funds paid by the company, **in consideration of the services of employees,** to the union treasury or the union officers, except under the process of strict accountability."

In its Memorandum of Points and Authorities in Support of Motion for Summary Judgment filed

before the District Court, appellee surety conceded that the health and welfare contributions and the benefits to the laborers flowing from such contributions were "compensation paid to an employee in furtherance of 'working conditions' inuring to the benefit of both employer and employee," but it claimed that such contributions are not covered by its bonds since they do not "fall within the classification of 'rate of pay' ". It is not essential to a recovery in this action, however, for the appellants to establish that the health and welfare contributions are a part of the "rate of pay" or the "wages" of the laborers involved.

There is respectable authority for the conclusion that health and welfare contributions are a part of "wages" for some purposes. For example, in *National Labor Relations Board v. W. W. Cross & Co.* (1st C.C.A. 1949) 174 F. (2d) 875, the court held that such contributions are a part of "wages" within the meaning of that term as used in the National Labor Relations Act. In this litigation, however **all that needs to be shown is that such contributions are a part of the agreed compensation for labor, since if they are and if they have not been paid, the contractor has not paid "in full" for the labor supplied to its projects.**

Clearly, until the required health and welfare contributions have been made with respect to the work of a laborer, the laborer has not been compensated "in full" for his services. He has been denied a credit toward substantial benefits which he has earned by his labor, and which Congress has been careful to pre-

serve for him through other legislation (see *supra,* p. 8).

In *Sherman v. Achterman,* decided on May 18, 1955 by the Appellate Department of the California Superior Court sitting in San Francisco, the court held that appellants in this proceeding, who were also plaintiffs in that case, were entitled to recover against the surety on a labor and material bond required on public work projects by Section 4200 of the California Government Code.* In analyzing the nature of health and welfare contributions, the court said (App. pp. ii-iv):

> "The trial judge sets forth the test upon which the decision was made, as follows: 'If the payments are part of wages due the laborers, the sums are within the provisions of the bond. If they are not such payments, no cause of action is stated.'
>
> However, the statute does not refer to wages, but requires that the bond provide that the surety will pay, when the contractor fails 'to pay for any materials, provisions, provender or other supplies, or teams used in, upon, for or about the performance of the work contracted to be done, *or for any work or labor thereon of any kind* . . . .'
>
> There may be, and these days there often are, payments for work or labor which are not wages. Measured by the test of 'wages' plaintiff would have some difficulty at once, because the Trust

*Since this decision, directly in point, has not as yet been officially reported, it is reproduced in full in the appendix to this brief.

Agreement expressly provides that the contribution to the Fund shall not 'constitute or be deemed to be wages due to the employees with respect to whose work such payments are made.' Whether this clause would prevent plaintiffs from showing that, in a broad sense, the payments are 'wages,' we need not decide. **They are payments for labor.**

We believe that the statute, and, therefore, the bonds (which under well known provisions of the law of suretyship, must be coequal with the requirements of the statute (*Los Angeles Stone Co. v. National Surety Co.,* 178 Cal. 247)) cover the payments required under the Trust Agreement.

Viewed from the standpoint of the employer, what else are these but payments for the performance of work? Why, except to purchase labor, did the employer agree to make the payments? Viewed from the employees' aspect, the payments must be regarded as payments for labor, too. The employees had a vital interest in having these payments made, because to the extent there was failure, the Fund would be diminished.

The Fund is not something which can be made up from other sources, including stockholders' equities in capital and surplus, such as are the resources of privately owned insurance carriers, which may supply workmen's compensation insurance. **It is a pool created by collective bargaining, and it has the character of a reward for labor.** If the employer were to announce, at the commencement of a public job, that he would not make the payments called for by the collective bargaining agreement, no doubt the labor unions

would not supply workers, and they would be perfectly within their rights. **A payment 'for labor' would have been defaulted.**

It does not seem important to us that the *benefits* from the Fund were not allocable to the particular job; the payments *into* the Fund were so allocable, and the default reduced the Fund pro tanto."*

The court in the *Achterman* case cited a recent decision of the Oregon Supreme Court, *Coos Bay Lumber Company v. Local 7-116, International Woodworkers of America (CIO),* 279 Pac. (2d) 508, rehearing denied 280 Pac. (2d) 412, decided January 26, 1955, wherein the nature of both employ*er*-paid contributions (of the type here involved) and employ*ee*-paid contributions was analyzed in the following terms (279 Pac. (2d) 512):

"Although in the cases just reviewed no distinction arose between employer-paid and employee-paid insurance programs, the Potlatch and Inland Steel decisions plainly decided that the term 'wages' as used in the Labor Management Relations Act embraces what, for convenience, may be referred to as employer-paid plans. Since such plans are mandatory subjects for collective bargaining, a union has authority to obtain a wage increase for its members in the form of an employer-paid insurance plan. It follows, therefore, that it also has the power to obtain a wage increase to be applied for the purchase of insur-

*Emphasis in italics is by the court.

ance as the union directs. **Both situations involve substantially the same thing: a wage increase which takes the form of group insurance. As compared with the situation where a collective bargaining agreement provides for a so-called employer-paid plan, a contract between an employer and a union, such as the one before us, only indicates more specifically what such a group insurance plan really is when it provides that it is to be financed by a wage increase. Therefore, the distinction between employer-paid and employee-paid plans is at best one of form, not of substance, and the rights of the parties are the same in the two situations.** International Woodworkers of America, Local 6-64, C.I.O. v. McCloud River Lumber Co., D.C., 119 F. Supp. 475, 486, in interpreting the provisions of a health and welfare insurance program substantially the same as the one before us, said:

'To this Court, the difference between "a wage increase intended as the method of financing the health and welfare plan" and "a wage increase to pay for a Health and Welfare Program for the employees" seems like the difference between tweedledum and tweedledee!' "

While the court in the *Achterman* case undertook to distinguish the pertinent provisions of the California Government Code from those of the Miller Act (App. pp. viii-x), clearly the primary purpose of both statutes is to protect laborers and suppliers against any loss. Insofar as the Miller Act is concerned, this purpose has been repeatedly stated by the United States Supreme Court, which has emphasized that the

Act must be liberally construed to effectuate such purpose.

McEvoy Co. v. United States (1944) 322 U.S. 102, 105;

Standard Ins. Co. v. United States (1938) 302 U.S. 422, 444;

Commercial Standard Ins. Co. v. United States (10th C.C.A. 1954) 213 F. (2d) 106, wherein the principal decisions of the Supreme Court on this point are cited and digested.

In *Hill v. American Surety Co.* (1906) 200 U.S. 197, the court said (p. 203):

> "But we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for and to provide a security to that end.
>
> Statutes are not to be so literally construed as to defeat the purpose of the legislature. 'A thing which is within the intention of the makers of the statute, is as much within the statute, as if it were within the letter.' *United States v. Freeman,* 3 How. 556. **'The spirit as well as the letter of a statute must be respected, and where the whole context of a law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.'** Chief Justice Marshall in *Durousseau v. United States,* 6 Cranch, 307."

In *Liebman v. United States* (9th C.C.A. 1946) 153 F. (2d) 350, this Court said (p. 352):

> "The purpose of the Miller act is to protect those who furnish materials or labor or both for public buildings and to insure the payment **in full** for such materials and labor."

In keeping with this rule of liberal construction the courts have held that a claim by a railroad for unpaid freight charges due for transportation of materials to a building was one for "labor and materials" within the meaning of the Act (*Standard Ins. Co. v. United States* (1938) 302 U.S. 442, *supra*); that groceries and provisions supplied to a contractor for the boarding of his workmen constituted "supplies furnished in the prosecution of the work" within the meaning of the Act (*Brogan v. National Surety Co.* (1918) 246 U.S. 257); that material which was furnished to a contractor and which was not actually used in performance of a contract, but which replaced identical material taken from the contractor's inventory and used on the contract job, also constituted "supplies furnished in the prosecution of the work" (*Commercial Standard Ins. Co. v. United States* (10th C.C.A. 1954) 213 F. (2d) 106, *supra*); and that services in inspecting and testing gravel constituted "labor" within the meaning of the Act (*American Surety Co. of New York v. United States* (5th C.C.A. 1935) 76 F. (2d) 67).

The distinction drawn by the court in the *Achterman* case between the provisions of the Miller Act and the provisions of the California Government Code is that the Miller Act refers to the *person* who may collect on the bond, whereas the California statute

refers to the *subject matter* of the payments secured by the bond (App. p. ix). This distinction, however, cannot justify a difference in treatment of health and welfare contributions under the two statutes, particularly in view of the Supreme Court's directive that the spirit as well as the letter of the Federal Act be respected.

Appellants are trustees for the men who performed the labor involved. They are given specific authority by the trust instrument to enforce the prompt payment of the health and welfare contributions due with respect to such labor (Admissions, Exh. C, Art. IV, sec. 3, Tr. 21), and the employee beneficiaries of the trust are expressly excluded from any conflicting right or claim to the contributions (Art. II, sec. 4). Appellants are authorized by court rule to bring this action in the name of the United States, for their own use and benefit and without joining with them the beneficiaries of the trust (Rule 17(a), Federal Rules of Civil Procedure), and counsel for appellees stated before the District Court that "we are not making any issue here as to their [appellants'] right to bring this action. . . . We are not interested in raising any question of right to sue, capacity or any such matters" (Tr. 33). Hence, appellants stand in the shoes of the men who furnished the labor as completely and effectively as an assignee (see *In re Schmidt* (1953) 24 CCH Labor Cases, para. 68,012), and the courts have expressly held that the provisions of the Miller Act are not so personal as to preclude

suit by assignees of the persons who furnished the labor.

Title Guaranty & Trust Co. v. Crane Co. (1910) 219 U. S. 24, 35;

U. S. Fidelity Co. v. Bartlett (1913) 231 U. S. 237;

United States v. Rundle (9th C.C.A. 1900) 100 Fed. 400, 403.

The District Court assumed, without any authority, that appellants would not have any claim for the contributions under the state mechanics' lien laws (Tr. 45-47), and then denied appellants relief in this action on the theory that the purpose of the Miller Act was "to protect those supplying labor and materials on government jobs substantially in the same way as they are protected under state mechanics' lien laws" (Tr. 25). The California courts have held that a mechanics' lien can be asserted for items of compensation other than periodic wages (see *Kritzen v. Tracy Engineering Co.* (1911) 16 Cal. App. 287, holding that a mechanics' lien for labor could include a sum due as reimbursement for traveling expenses), and no case has held that the trustees of a welfare fund cannot claim a mechanics' lien for delinquent health and welfare contributions. If arguments are to be drawn from analogies to the state law, however, it is obvious that the California statute requiring payment bonds on state and other public projects (Government Code, sections 4200 *et seq.*) furnishes a closer analogy to the Miller Act than the mechanics'

lien law. And under this statute, as we have shown (*supra,* p. 10), health and welfare contributions are recoverable against the surety.

For the foregoing reasons, we respectfully submit that the payment bonds which were furnished by appellee surety should be construed as securing the payment of the health and welfare contributions demanded in this action.

B. THE OBLIGATION OF THE PAYMENT BONDS SHOULD BE CONSTRUED TO COVER CLAIMS FOR HEALTH AND WELFARE CONTRIBUTIONS FOR THE FURTHER REASON THAT SUCH CONSTRUCTION WILL EFFECTUATE THE OBJECTIVE OF THE MILLER ACT TO PROTECT THE GOVERNMENT AGAINST DELAYS ON ITS PROJECT.

In *Standard Ins. Co. v. United States* (1938) 302 U.S. 442, in holding that freight charges of a railroad constitute "labor" within the meaning of a payment bond, the Supreme Court said (pp. 443-445):

> "Petitioner maintains that freight cannot be considered as 'labor or material' without doing violence to the words of the statute; also that Congress did not intend to extend further protection to carriers who could enforce their lien for charges by retaining and selling the materials.
>
> *Stuart for use of Florida East Coast Ry. Co. v. American Surety Co.,* Circuit Court of Appeals Fifth Circuit (1930) *supra,* carefully considered and denied these defenses and stated reasons therefor which we deem adequate. This was followed by the court below in the present cause.
>
> * * * * * * *

> Nor do we find reason for excluding the carrier from the benefit of the bond because it might have enforced payment by withholding delivery. The words of the enactment are broad enough to include a carrier with a lien. Nothing in its purpose requires exclusion of a railroad. **Refusal by the carrier to deliver material until all charges are paid might seriously impede the progress of public works, possibly frustrate an important undertaking.''**

In *City of Stuart v. American Surety Co.* (5th C.C.A. 1930) 38 F. (2d) 193, to which the Supreme Court had referred with approval in the *Standard Ins. Co.* case, the court said (p. 195):

> ''In addition to protecting the honest claims of persons who have contributed to the performance of the job, the legislative intent no doubt was also **to minimize impediment and delay of the work, and facilitate procurement of labor and materials, through the security afforded by the bond.** If the carrier is included in its benefits, this intent will be served. If he is not included, he must hold the freight until payment is made, and sell it for charges if it is not, to the embarrassment of the work.''

The reasoning of the court in the *Standard Ins. Co.* case applies with peculiar force to claims for health and welfare contributions. As we have pointed out, the obligation to make these contributions is imposed by the Master Labor Agreements with the Northern California District Council of the Laborers Union. Every major construction project in Northern Cali-

fornia is manned under the terms and conditions of these agreements, and the right of the individual contractor to procure laborers for his projects is dependent upon adherence to and compliance with these Master Agreements. A failure to pay health and welfare contributions is a breach of the Master Agreements (*Sherman v. Achterman,* App. p. iv; *Dunbar Co. v. Painters & Glaziers District Council No. 51* (D.C. D. of C. 1955) 27 CCH Labor Cases, para. 68,921, p. 88,093), and the Laborers Union has asserted the right to withdraw and withhold laborers from contractors who are thus in default. The individual contractor has no practical remedy for such enforcement action, and the taking of the action could seriously delay or even terminate his performance of a Government contract. For this reason, just as in the freight cases, a holding that health and welfare contributions are covered by the security of the bond is important to the protection of the Government as well as of the individual laborer.

C. THE OBLIGATION TO PAY LIQUIDATED DAMAGES AND ATTORNEYS' FEES IN THE EVENT OF A DEFAULT IS A PART OF THE TOTAL OBLIGATION ASSUMED BY THE CONTRACTOR IN CONSIDERATION FOR THE SERVICES SUPPLIED TO HIM, AND CONSEQUENTLY THIS OBLIGATION IS LIKEWISE COVERED BY THE PAYMENT BONDS.

At the time the Health and Welfare Plan was negotiated with the Laborers Union, the contractors were concerned about the uncertain liabilities which might be involved in an agreement to make contribu-

tions to a fund to provide insurance for their employees. Specifically, they were concerned with a claim made by the Union that a delinquent employer could be held liable for the full amount of any insurance benefits lost through such delinquency (see *Frankel, The Health and Welfare Trust: Damages for Failure to Contribute* (1954) 5 CCH Labor Law Journ. 28). Various provisions protecting against any such uncertain liability were negotiated as a part of the Master Trust Agreement, including the following provision of Section 8 of Article II (Admissions, Exh. C, Tr. 21):

> ". . . The parties recognize and acknowledge that the regular and prompt payment of employer contributions to the Fund is essential to the maintenance in effect of the Health and Welfare Plan, and that it would be extremely difficult, if not impracticable to fix the actual expense and damage to the Fund and to the Health and Welfare Plan which would result from the failure of an individual employer to pay such monthly contributions in full within the time above provided. Therefore, the amount of damage to the Fund and Health and Welfare Plan resulting from any such failure shall be presumed to be the sum of $20 per delinquency or 10% of the amount of the contribution or contributions due, whichever is greater, which amount shall become due and payable to the Fund as liquidated damages and not as a penalty, in San Francisco, California, upon the day immediately following the date on which the contribution or contributions become delinquent and shall be in addition to said delinquent contribution or contributions."

The parties likewise provided in Section 3 of the Article IV of the Trust Agreement (Tr. 21) as follows:

> "The Board of Trustees shall have the power to demand and enforce the prompt payment of contributions to the Fund, and the payments due to delinquencies as provided in Section 8 of Article II. If any individual employer defaults in the making of such contributions or payments and if the Board consults legal counsel with respect thereto, or files any suit or claim with respect thereto, **there shall be added to the obligation of the employer who is in default, reasonable attorneys' fees, court costs and all other reasonable expenses incurred by the Board in connection with such suit or claim.**"

Under these provisions the obligation to pay liquidated damages and reasonable attorneys' fees in the event of default is an integral part of the total obligation of the defendant contractor to make health and welfare contributions with respect to the services of laborers working on its Government projects. Liquidated damages and attorneys' fees were a part of the agreed payment for labor which was held to be recoverable against the surety in *Sherman v. Achterman,* and as a part of such agreed payment, they should also be recoverable against the surety under a Miller Act bond.

United States v. Breeden (D. Alaska (1953)) 110 F. Supp. 713;

United States v. Henley (D. Ida. 1954) 117 F. Supp. 928.

In *United States v. Breeden, supra,* the court said with respect to attorneys' fees (p. 715):

"We must first consider the precise language of the Miller Act in this respect, which is that the payment bond is given 'for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person.' No specific limitation has been found in this act or any other Federal law which forbids the allowance of attorneys' fees as part of costs for the persons who are obliged to bring suit on surety company's bonds. The text of the law would indicate it must have been the purpose of Congress to protect **all persons** supplying labor and material in the prosecution of work upon such contracts. Surely, the Congress cannot have contemplated that the persons supplying such labor and material should be obliged, in the event of the default of the contractors, to pay to their own attorneys without recompense a substantial portion of the amounts actually due them for the labor and materials supplied to the contractors. Such a rule would penalize the suppliers to the advantage of the sureties on the contractors' bonds. **The protection demanded by the law is full protection to the suppliers and not partial protection, as would be the case if the attorneys' fees of the suppliers who are obliged to bring suit, could not be taxed as a part of the costs.**"

CONCLUSION.

This case, and the *Achterman* case in the State court, are of first impression not only in California and this Circuit but throughout the Nation. As such, their importance transcends the relatively small monetary amounts in litigation. They present one aspect of the problem of making the manifest benefits of low-cost group health insurance available to the men who perform the casual employment which characterizes the building and construction industry.

The widespread utilization of group health insurance is a modern development but the social desirability and need for such insurance is attested by the rapidity of its growth.

In January, 1954, the Subcommittee on Welfare and Pension Funds reported to the Senate Committee on Labor and Public Welfare as follows (Interim Report, 84th Cong., 1st Sess., entitled "Welfare and Pension Plan Investigation," pp. 3, 5):

> "Employee welfare and pension plans have developed to the point where they now constitute a significant and important factor in our national economy . . . Today, welfare and pension plans are part and parcel of the entire fabric of wages and working conditions in an employee's 'contract of employment' . . .
>
> * * * * * * *
>
> No exact information is available concerning the total employee coverage under benefit plans which are collectively bargained. The best available information indicates, however, that as of mid-1954 at least 11,290,000 workers were cov-

> ered by collectively bargained welfare and pension plans. This represents an increase of more that 47 percent in the worker coverage under collectively bargained group-benefit plans since mid-1950."

A large industry-wide health and welfare plan, such as the one administered by appellants for the construction laborers in Northern California, provides the most economical and effective means of making health insurance benefits available to building tradesmen. Under such a plan many small contractors and builders, by contributing a fixed amount per hour of work to a central trust fund, can provide benefits for their employees far in excess of those which they could purchase for the same money as individual employers. Conversely, under the plan building tradesmen who are required by the nature of their employment to shift continually from one employer to another can pool their credits with the central fund so as to secure continuous insurance coverage without regard to the number of employers for whom they work or the period of their employment with any single employer. The central trust fund, administered by trustees who are chosen representatives of employers and employees in the industry, provides an essential focal point, to which the contributions of thousands of employers can be directed, which can purchase insurance coverage at a minimum cost from a single carrier and which can receive and pay promptly the claims originating from the thousands of employees and dependents who are covered by the health and welfare plan.

Using appellants' Fund by way of illustration, during the fiscal year of the Fund which ended May 31, 1955, over 3300 individual employers contributed a total of $2,290,774 to the Fund. The Fund during that year provided over 15,000 construction laborers with insurance coverage for themselves and their dependents consisting of $2000 life insurance on the employee, plus accidental death and dismemberment insurance in the amount of an additional $2000; life insurance on dependents ranging from $100 to $1000 depending upon age; and hospital and surgical benefits for the non-occupational injury or illness of the employee and his dependents, consisting of full reimbursement for the cost of ward service in a hospital for a maximum of 70 days, reimbursement for special hospital charges in full up to $400 plus 75% of charges over $400, surgical expense benefits under a $300 surgical schedule, reimbursement for doctor's home, office and in-hospital calls, X-ray and laboratory expense reimbursement up to $50 and supplemental accident expense payments up to $300.

The court will at once appreciate the tremendous social value which is attached to benefits of this sort. Men who, in the past, would have become public charges when misfortune struck are now being provided with complete hospital, medical and surgical care out of funds created through their own toil and sweat. They receive needed care and attention without the stigma of public charity and without drain on the taxpayer. Because they know that the cost will not come out of their meager savings, if any, they are

encouraged to seek medical and hospital attention at an early stage of an illness or for an injury which, if unattended, could have serious consequences. In addition, hospitals and doctors have assurance that their bills will be paid promptly, thereby creating important savings in the over-all cost of hospital, surgical and medical care.

In order to make health and welfare funds feasible for the building and construction industry, it has been necessary (1) to provide that contributions be made directly to the funds by the employers rather than by the employees; (2) to look to the unions rather than to the individual employees for the necessary authorizations; (3) to provide that the individual employees shall have no interest in the contributions as distinguished from the benefits to be provided by the funds; and (4) to require that individual employees meet minimum work requirements in order to enjoy the benefit of the funds. In the absence of these provisions, the funds would be faced with insurmountable problems of collection, endless litigation concerning the rights of employees who did not qualify for coverage and the insoluble problem of providing substantial benefits for men who did not earn sufficient contributions to pay for such benefits.

We submit that these necessary peculiarities of health and welfare funds in the building and construction industry should not be used as makeweight arguments to stultify and emasculate the clear obligation of the appellee surety to pay *in full* for all work or labor performed on the bonded projects. Both reason

and equity demand that health and welfare contributions be held to be within the coverage of the bonds in suit.

As the court pointed out in the *Achterman* case, the health and welfare contributions which the individual contractors have agreed to pay as partial consideration for the services of the construction laborers are the life blood of the Fund. If these contributions were not paid, the Fund would quickly disappear and the substantial benefits described above would end. While the failure of a single contractor to make his contributions would have slight effect upon the Fund, an accumulation of such failures would threaten its destruction, and would most certainly deprive those men who worked for the delinquent contractors of the insurance coverage which they had earned by their labor.

We respectfully submit that, in the light of the foregoing, no stretching or "extending" of the letter of the Miller Act is required to hold that appellants, and the laborers for whom they are trustees, are entitled to the security of appellee's bond. Contrary to the conclusion of the District Court (Tr. 26), the contributions sought to be recovered are directly related to work performed on the defendant contractor's government projects. They came due solely because such work was furnished and their amount is measured exactly by the number of hours of work performed. Certainly it was the intent of Congress to protect the laborer as to every element of his compensation and the novelty of the health and welfare

element should not preclude a holding that such element is just as much within the protection of the bond as the laborer's hourly wage.

For the foregoing reasons, the judgment of the District Court should be reversed and this court should direct that a summary judgment be entered in favor of appellants.

Dated, July 5, 1955.

CHARLES P. SCULLY,
GARDINER JOHNSON,
THOMAS E. STANTON, JR.,
Attorneys for Appellants.

JOHNSON & STANTON,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

FILED
MAY 18, 1955
MARTIN MONGAN, Clerk
By J. F. Witman
Deputy Clerk

In the Superior Court of the State of California,
in and for the City and County of San Francisco

APPELLATE DEPARTMENT

Harry Sherman, et al., Plaintiffs and Appellants, vs. Leonard Achterman, et al., Defendants and Respondents.	Appeal No. 2368
J. F. Cambiano, et al., Plaintiffs and Appellants, vs. Leonard Achterman, et al., Defendants and Respondents.	Appeal No. 2370

MEMORANDUM OPINION

These appeals present a question new to the courts of this state. The facts are undisputed, the appeals being based on judgments upon orders sustaining de-

murrers without leave to amend, and are set forth in the next paragraph as they have been copied from the opinion of the learned judge who rendered the judgments.

This is an action against a firm of contractors and the insurance company furnishing the construction bond, for alleged default in payment of wages due laborers.

The complaint, by appropriate allegations, sets forth the execution, by the contractors, of two building contracts. The complaint further recites that a written Trust Agreement was entered into between the contractors, as members of an Employers' Association, and the Union representing certain employees on the job in question, whereby the contractors would contribute and pay into a Health and Welfare Fund, established by said above-mentioned contract, the sum of 7½ cents per hour for each hour worked by laborers in its employ on said jobs.

The contractor defaulted in making the required payments into the Fund for workmen on the two jobs bonded, and plaintiffs, as Trustees of the Health and Welfare Fund above mentioned, seek recovery on the bond. By general demurrer, the defendant insurance company questions the sufficiency of facts to constitute a cause of action, and also the legal capacity of the plaintiffs to sue.

The trial judge sets forth the test upon which the decision was made, as follows: "If the payments are part of wages due the laborers, the sums are within

the provisions of the bond. If they are not such payments, no cause of action is stated."

However, the statute does not refer to wages, but requires that the bond provide that the surety will pay, when the contractor fails "to pay for any materials, provisions, provender or other supplies, or teams used in, upon, for or about the performance of the work contracted to be done, *or for any work or labor thereon of any kind. . . .*"

There may be, and these days there often are, payments for work or labor which are not wages. Measured by the test of "wages" plaintiff would have some difficulty at once, because the Trust Agreement expressly provides that the contribution to the Fund shall not "constitute or be deemed to be wages due to the employees with respect to whose work such payments are made." Whether this clause would prevent plaintiffs from showing that, in a broad sense, the payments are "wages", we need not decide. They are payments for labor.

We believe that the statute, and, therefore, the bonds (which, under well known provisions of the law of suretyship, must be coequal with the requirements of the statute (*Los Angeles Stone Co. v. National Surety Co.,* 178 Cal. 247)) cover the payments required under the Trust Agreement.

Viewed from the standpoint of the employer, what else are these but payments for the performance of work? Why, except to purchase labor, did the employer agree to make the payments? Viewed from

the employees' aspect, the payments must be regarded as payments for labor, too. The employees had a vital interest in having these payments made, because to the extent there was failure, the Fund would be diminished.

The Fund is not something which can be made up from other sources, including stockholders' equities in capital and surplus, such as are the resources of privately owned insurance carriers, which may supply workmen's compensation insurance. It is a pool created by collective bargaining, and it has the character of a reward for labor. If the employer were to announce, at the commencement of a public job, that he would not make the payments called for by the collective bargaining agreement, no doubt the labor unions would not supply workers, and they would be perfectly within their rights. A payment "for labor" would have been defaulted.

It does not seem important to us that the *benefits* from the Fund were not allocable to the particular job; the payments *into* the Fund were so allocable, and the default reduced the Fund pro tanto.

Finally, from the standpoint of the public interest, these payments would seem to be "for labor". As appellant points out, the union could strike when these payments were not made, thus delaying public improvements. This is not by any means, as respondent intimates in its brief (p. 2) a "threat of labor delays and strikes if this Court's decision is not in favor of appellant." It is simply a statement that if an em-

ployer fails to pay what admittedly he should pay, and his surety does not have to make up his principal's deficiency, there could be a strike (though there was none in this case), and that the public has an interest in preventing such interruption of public work, brought about by the employer's default.

Since the judgment by the trial court, the Supreme Court of Oregon has decided a case which considers the nature of agreements for group insurance of employees. The case is that of *Coos Bay Lumber Company v. Local 7-116, International Woodworkers of America,* 279 Pac.2d 508; 60 Ore. Adv. Sheets 67. The Court there held that a group insurance program is primarily for the benefit of the members of the union, and is the subject of collective bargaining as covered by the National Labor Relations Act, and that individual employees who do not wish to participate must, nevertheless, be subject to the agreement made by their union. Thus, the subject has been taken away from the employees, individually. The Court held that there is no real difference between an "employee-paid" plan where the 7½c is actually deducted from the worker's wage, and an "employer-paid" plan where the amount agreed upon in the collective bargaining agreement is paid directly by the employer to the trustees. The court says (60 Ore. Adv. Sheets, at p. 76):

> "Since such plans are mandatory subjects for collective bargaining, a union has authority to obtain a wage increase for its members in the form of an employer-paid insurance plan. It fol-

> lows, therefore, that it also has the power to obtain a wage increase to be applied for the purchase of insurance as the union directs."

We are aware that in the *Coos Bay* case the 7½c was referred to as a wage increase, and that in the present case the required payments were stated *not* to be wages (no doubt to avoid the very difficulty that arose in the *Coos Bay* case, where some of the individual employees wished the sums paid to them, not to the Fund), but the result was the same; in neither case did the employee actually receive the amounts into his pocket, whether they were called wages or not. The case is important because it shows there is no real distinction between employer-paid and employee-paid plans, a distinction which the trial court made in the present case. (opinion, p. 4.)

We examine now the authorities cited; first those given by respondent.

The first is, *City of Portland ex rel. National Hospital Association,* 9 Pac. 2d 115, which was cited in the Court's memorandum as well. In that case, the contractor had agreed with the City of Portland, in connection with public work done for the city, that he would "fully secure and pay just claims, if any there be, of all persons furnishing labor or material under said contract." The contractor agreed with the hospital association to pay a certain amount for each employee (and the contractor deducted that amount from the wages, although the contract with the hos-

pital association was silent on this) in return for health coverage. When the contractor defaulted, the association sought to obtain payment of its fees from the surety.

It was held that the surety was not liable. The Supreme Court held that under its contract the association was not concerned with the source of its fees, for it could look to the contractor for them whether or not he deducted them from the employees' wages. The employee owed the association nothing, and therefore could not have been deemed to have assigned anything to the association. Thus, there was no one before the Court who came within the category set forth in the statute, namely, "all persons furnishing labor" etc.

We believe the *City of Portland* case is to be distinguished from the one before us on at least three grounds. In the first place, the Oregon statute refers to the *persons* to whom claims shall be paid, that is, "persons furnishing labor"; but the California statute refers to the *subject matter* for which the contractor has defaulted, that is, his failure "to pay . . . for any work or labor."

In the second place, in the Oregon case it was a matter more or less of indifference to the laborer whether or not the health association was paid, because he was entitled to benefits anyway. This feature also distinguishes our holding in *California Western States Life Ins. Co. v. U.S.F. & G. Co.,* Civil Ap-

peal No. 2189, wherein we held that the Unemployment Disability carrier's premium is not covered by the surety bond of a public works contractor. This is because it does not concern the employee, who has no substantial interest whether the premium is paid or not. The same holds true of the cases of compensation carrier premiums.

Finally, the *City of Portland* case was decided in 1932, before the time of the National Labor Relations Act, which makes such plans for health insurance the subject of collective bargaining on behalf of all the employees. (*Coos Bay* case, supra.)

Also, we believe distinguishable are the several cases in which it has been held that income taxes withheld by the employer are not within the provisions of labor and material bonds. The laborer has no interest (above that of any citizen) in the payment to the government of his withheld taxes. His taxes are deemed paid even if the contractor fails to remit to the government, and he gets whatever refund he may be entitled to, though the employer has defaulted.

Likewise, it has been stated that the government has ample powers to protect itself in order to collect taxes. (*Gen. Casualty Co. v. United States,* 205 Fed. 2d 753, 755.) The United States need not appear as standing in the shoes of an unpaid workingman.

The case of *United States ex rel. Sherman v. Carter,* 33521, decided by the U. S. District Court on January 21, 1955 (and now on appeal), is cited by respond-

ents. The contract, under collective bargaining, for payment of employee health and welfare contributions, is the same as the one before us. The Court held that such payments are not recoverable from the defunct contractor's surety under the Miller Act. (Title 40 USCA 270a et seq.) However, apart from the fact that the judgment has been appealed, and in any case is not controlling upon us, we find it is to be distinguished from California cases in two respects: First, the Miller Act, in Section 270b of the United States Code, reads:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full"

may recover from the surety. Thus, as in the *City of Portland* case statute, the statute refers to the *person* who may collect, rather than to the *subject matter,* as does the California statute. This is by no means a too-refined distinction, because the Court pointed out in the *Carter* case, supra, that the *laborers* had been paid in full. In a sense, perhaps, they had been so paid; but, considering that there were no payments coming to *them,* or to trustees for them, it does not follow that there were no payments due *for labor,* as the California statute states it.

In the second place, the Miller Act evidently is to protect "those supplying labor and materials on government jobs substantially in the same way as they

are protected under state mechanics' lien laws." (*Carter* case, pp. 1 and 2; *United States v. Harman,* 192 Fed. 2d 999.)

Considering, finally, the reasoning of the Court in the *Carter* case to the effect that the benefits are not allocable to the employees on the specific job, but are reserved for employees on any job who have worked 400 hours in a six-month period, we think that it is not of importance, at least so far as the California statute is concerned. The test is that set forth in the statute. If the payments are for labor, they are covered by the surety bond.

It is argued by respondents that the fact that section 2404 of the Government Code was amended to include within its provisions payments due under the Unemployment Insurance Act is proof that other "fringe" benefits are not so included. But we think the legislature, when courts decided that the unemployment payments were not covered, simply made haste to cover them; we do not think the legislature would have those payments included and these excluded.

These cases presently before us are, as stated at the outset, the first ones before the courts. It seems to us that when the contractor and the union agreed upon payments by the former of the welfare funds, it was an agreed payment "for labor"; that the surety company could ascertain that these payments were to be made and could base its premium rates accordingly, just as the contractor must have included them in

his estimate of the cost of the job. They were ascertainable as much as were outright wages.

The judgments based on the orders sustaining the demurrers without leave to amend are reversed.

Dated, May 18th, 1955.

/s/ Preston Devine
Presiding Judge.

I concur:

/s/ Edward Molkenbuhr
Judge.

I dissent. I agree with the opinion of Judge Caulfield of the Municipal Court.

/s/ Daniel R. Schoemaker
Judge.

In the Superior Court of the State of California,
in and for the City and County of San Francisco

APPELLATE DEPARTMENT

Harry Sherman, et al., Plaintiffs and Appellants, vs. Leonard Achterman, et al., Defendants and Respondents.	Appeal No. 2368
J. F. Cambiano, et al., Plaintiffs and Appellants, vs. Leonard Achterman, et al., Defendants and Respondents.	Appeal No. 2370

MEMORANDUM OPINION ON PETITION FOR REHEARING

On Petition for Rehearing it is urged that plaintiffs have no right to bring the action because: (a) they are not parties to the bond; and, (b) the cause of action is created by Section 4205 of the Government Code, not Section 4204 of that Code.

Although this argument was not stressed at the hearing before us and was not convincing to the trial court, nevertheless we have given it full consideration. We did not decide the case on the inability of counsel to answer a question put to him on oral argument.

We believe that although plaintiffs are not parties to the bond they may maintain the action as trustees. The United States Labor Relations Act contemplates that there may be such a trusteeship. (18 U.S.C. Sec. 186, Sub. Div. 5.) Section 369 C.C.P. allows trustees to sue. We think it likely that there was at least an equitable assignment to the trustees. (In re Schmidt, 24 Labor Cases (CCH) #68012). If the facts of the case do not sustain this proposition, it will be remembered that we are deciding upon judgment after sustaining of a demurrer without leave to amend.

We believe, too, that Sections 4204 and 4205 of the Government Code are cumulative, that the bond must comply with both, and that it is not necessary that one be entitled to the benefits of mechanics' lien laws in order to be protected under the public works surety acts. It has been held that the latter acts are broader in scope (*A. L. Young Mch. Co. v. Cupps,* 213 Cal. 210 and cases cited therein), and that, procedurally, one may sue on a contractor's bond without resorting to the Mechanics Lien Statutes. (*Sunset Lumber Co. v. Smith,* 95 Cal. App. 307.) If Section 4205 of the Government Code were the only one "creating" rights

against the surety, what is the purpose of Section 4204? We do not believe it is merely a prelude to 4205.

The petition for rehearing is denied.

Dated, June 17, 1955.

/s/ Preston Devine
Presiding Judge.

I concur:

/s/ Edward Molkenbuhr
Judge.